SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 288

O. V. FOY,

Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY; BROTHERHOOD OF RAILROAD TRAINMEN; BROTHERHOOD OF RAILROAD TRAINMEN, LOCAL LODGE NO. 550; JOHN JENNINGS, SECRETARY, LOCAL LODGE NO. 550, BROTHERHOOD OF RAILROAD TRAINMEN, AND JOHN CARTOS, PRESIDENT AND LOCAL CHAIRMAN, LOCAL LODGE NO. 550, BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

BRIEF IN OPPOSITION OF BROTHERHOOD

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BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI FILED ON BEHALF OF BROTHERHOOD, ET AL

This Brief in Opposition is filed on behalf of the Brotherhood of Railroad Trainmen; Brotherhood of

Railroad Trainmen, Local Lodge No. 550; John Jennings, Local Secretary; and John Cartos, Local President. These respondents will be referred to collectively as the "Brotherhood".

STATUTES INVOLVED

Petitioner's Petition fails to set forth the procedural statutes involved.

Rule 6 (b), Federal Rules of Civil Procedure, provides:

> "(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) *upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;* but it may not extend the time for taking any action under Rules 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them."

Rule 56, Federal Rules of Civil Procedure, provides:

> "Rule 56. Summary Judgment
>
> "(a) For Claimant. A party seeking to recover

upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. *The adverse party prior to the day of hearing may serve opposing affidavits.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*"
(Italics supplied)

STATEMENT OF FACTS

Petitioner, a Negro brakeman employed by Norfolk and Western Railway since 1926 and a member of the Brotherhood since 1957, commenced, on March 17, 1965, in the United States District Court for the Eastern District of Virginia, an action under the Railway Labor Act (45 USC §151, et seq.) alleging racial discrimination in certain promotion practices of the railroad in concert with Brotherhood and certain of its local officers. The railroad answered and denied the allegations

of the original Complaint. The Brotherhood appeared and filed a Motion to Dismiss under Rule 12, with supporting Affidavits and exhibits [which was treated by the Court as a Motion for Summary Judgment] on the ground the petitioner's Complaint did not allege exhaustion of intra-union remedies, or show any legally cognizable excuse for his failure so to do.

The petitioner was (and still is) an employee of the railroad and a member of the Brotherhood. He is not a discharged employee of the Norfolk and Western Railway Company, nor has he been expelled, suspended or separated from the Brotherhood. Petitioner has been at all times, and still is, subject to the contractual agreement between the Brotherhood and the railroad, and has been at all times, and still is, subject to the Constitution of the Brotherhood, although he has wholly failed to comply with a single step of the grievance procedure of either the railroad's collective bargaining agreement or the Brotherhood's Constitution.

The District Court sustained the Brotherhood's Motion for Summary Judgment to the original Complaint on April 4, 1966 and would have entered final judgment against plaintiff, but in the interest of justice granted plaintiff's motion to amend his Complaint to allege any excuse he had for failure to exhaust available intra-union remedies.

Petitioner's unsworn Amended Complaint still alleged no adequate excuse for failure to exhaust intra-union remedies; whereupon, the Brotherhood and the railroad each filed Motions to Dismiss the Amended Complaint, with supporting Affidavits and exhibits, to

which plaintiff filed no counter-affidavit or sworn response as required by Rule 56 (e).

One of the Brotherhood's supporting Affidavits to its Motion for Summary Judgment was made by O. L. Brown, Chairman of the General Grievance Committee on the Norfolk and Western Railway System, who affirmed that grievances filed by other Negro employees of Norfolk and Western Railway alleging racial discrimination in promotion practices had been successfully processed through the general grievance procedure of the Brotherhood. Brown further affirmed that plaintiff's grievance would have been similarly processed but plaintiff never pursued these intra-union grievance procedures, even though plaintiff has conceded he was fully aware of the availability of such grievance procedures.

When the plaintiff did not file any counter-affidavit denying the assertions of O. L. Brown that the Brotherhood's grievance procedure had provided other Negroes an adequate and complete remedy where racial discrimination was alleged, the issue of adequacy of intra-union remedies was resolved in favor of the Brotherhood as a matter of law under Rule 56 (e). For the same reason, the issue of alleged failure to represent was also resolved against plaintiff, and summary judgment was granted as to the Amended Complaint.

After the second hearing on August 3, 1966, when the District Judge had granted summary judgment in favor of the Brotherhood and the Railroad on their separate Motions for Summary Judgment to the Amended Complaint, the plaintiff asked leave to file counter-affidavits, but could not advise the Court: (1) who

would make the counter-affidavits; (2) what facts such affidavits would show; nor (3) what, if any, excuse, existed explaining why the counter-affidavits had not been timely filed when the plaintiff had been aware for over a year counter-affidavits would have to be filed under Rule 56 (e) or summary judgment would go against him. Noting the plaintiff had 10 weeks notice to file Affidavits before the argument of the second Motions for Summary Judgment, the District Court denied plaintiff's motion to file counter-affidavits and granted summary judgment for defendants on the Amended Complaint.

HOLDING OF THE CIRCUIT COURT

On appeal to the Circuit Court, the Court held:

(1) The provisions of the Labor-Management Reporting and Disclosure Act permitting a union to have constitutional provisions requiring an employee-member to exhaust reasonable intra-union hearing procedures [but not to exceed 4 months lapse time] before instituting suit, *is not mandatory,* but "allows the courts in their discretion to determine whether pursuit of such remedies is required."

(2) That as a general rule courts exercise their discretion to require exhaustion of intra-union remedies prior to suit, in the absence of some showing that to do so would be futile or that the intra-union remedies are inadequate.

(3) That Rule 56 (e) required the plaintiff to support his claim beyond mere allegation, which plaintiff wholly failed to do.

(4) That the District Judge, in applying Rule 6 (b) and Rule 56, did not abuse his discretion in denying plaintiff's Motion to file counter-affidavits, after the court had previously permitted plaintiff to amend his Complaint following the earlier summary judgment to original Complaint, and had allowed plaintiff 10 weeks from May 27, 1966 to August 3, 1966 to file any Affidavits, depositions or interrogatories he might conclude to file to raise a bona fide factual issue of futility or excuse.

(5) That the District Court did not abuse its discretion in granting summary judgment for defendants under Rule 56.

Brotherhood submits this holding is clearly right and should be affirmed.

REASONS FOR DENYING THE WRIT

Brotherhood respectfully submits the Writ sought should be denied because:

(1) The decision of the Circuit Court sought to be reviewed does not conflict with the decision of any other Circuit Court. On the contrary, it is in accord with the decision of the Ninth Circuit in *Neal* v. *System's Board of Adjustment,* 348 F. (2d) 722 (8th Cir. 1965), squarely holding that an allegation of racial discrimination does not excuse exhaustion of adequate and available intra-union remedies. This concept of exhaustion of remedies was applied in *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 US 210 (1944); *Neal* v. *System's Board of Adjustment,* 348 F (2d) 722 (8th Cir. 1965); *Harris* v. *International Longshoremen's Assoc., Local 1291,* 321 F 2d 801 (3rd Cir. 1963); *Parks* v. *Inter-*

national Brotherhood of Electrical Workers, 314 F 2d 886 (4th Cir. 1963); *Detroy* v. *American Guild of Variety Artists,* 286 F 2d 75 (2nd Cir. 1961); *Fingar* v. *Seaboard Air Line Railroad Company,* 277 F 2d 698 (5th Cir. 1960); *Gainey* v. *Brotherhood of Railway and Steamship Clerks,* 275 F 2d 342 (3rd Cir. 1960), [cf. *Gainey* v. *Brotherhood of Railway and Steamship Clerks,* 313 F 2d 318 (3rd Cir. 1963)]; *Thompson* v. *New York Central Railroad Company,* 250 F. Supp. 175 (SD NY 1966); *Long Island City Lodge 2147* v. *Railway Express Agency, Inc.,* 217 F. Supp. 907 (SD NY 1963); *Martin* v. *Kansas City Southern Railway Company,* 197 F. Supp. 188 (WD La. 1961); *Fagan* v. *Pennsylvania Railroad Company,* 173 F. Supp. 465 (MD Pa. 1959).

(2) No important Federal question has been decided which has not been, or should be, settled by this Court because:

(a) The case below resulted in an award of summary judgment for defendants when plaintiff could not and did not make a factual showing beyond mere allegation that his admitted intra-union, contractual and administrative remedies were not available or adequate. The Court merely applied the clear provisions of Rule 56 (e).

(b) Neither the District Court nor the Circuit Court said the Labor-Management Reporting and Disclosure Act *required* plaintiff to exhaust intra-union remedies as asserted by plaintiff in his Petition for a Writ of Certiorari. To the contrary, the Circuit Court held the requirement of exhaustion is in the Court's discretion and in this case the District Court did not abuse its discretion in requiring plain-

tiff to exhaust available and adequate intra-union remedies.

(c) The Circuit Court did not decide subject case contrary to the decision of the Supreme Court in *Walker* v. *Southern Railway Co.*, 385 US 196, 17 L Ed. (2d) 294, 87 S. Ct. 367, as plaintiff alleges in his Petition. The *Walker* case, supra, involved the duty of a discharged employee who had accepted his discharge as final and who was no longer subject to the collective bargaining agreement with the railroad to comply with the mandatory arbitration requirements of the collective bargaining agreement and/or the Railway Labor Act. The remedies of a discharged employee to sue his employer with respect to his discharge under the doctrine of *Moore* v. *Illinois Central RR,* 312 US 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941) cannot be equated to the right of an employee-member of the Brotherhood to sue his Brotherhood without first exhausting available and adequate intra-union remedies.

(d) The action of the District Court in refusing to allow plaintiff to file counter-affidavits following the granting of the Motions for Summary Judgment filed against the Amended Bill do not conflict with *Forman* v. *Davis,* 371 US 178, 9 L. Ed. (2d) 222, 83 S. Ct. 227 and *Conley* v. *Gibson,* 355 US 41, 2 L. Ed. (2d) 80, 78 S. Ct. 99. Plaintiff here utterly failed to file counter-affidavits to defendants' affidavits within the time prescribed by Rule 56 (c) or as required by Rule 56 (d), nor did plaintiff show the Court such failure to file resulted from "excusable neglect" under Rule 6 (b). The District Judge did not abuse his discretion in denying plaintiff's untimely motion to file counter-affidavits.

CONCLUSION

For the foregoing reasons The Brotherhood respectfully submits that plaintiff's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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I hereby certify that a copy of the foregoing Brief in Opposition to Granting Writ of Certiorari was mailed to Howard I. Legum and Louis B. Fine, Fine, Fine, Legum & Fine, 720 Law Building, Norfolk, Virginia 23510, Attorneys for Petitioner, and Joseph L. Kelly, Jr., Maritime Tower, Norfolk, Virginia 23510, Attorney for Norfolk and Western Railway Company, on the 11th day of July, 1967.

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